



BILLING CODE: 3510-DS-P

## **DEPARTMENT OF COMMERCE**

### **International Trade Administration**

**[A-201-820]**

#### **Fresh Tomatoes from Mexico: Intent to Terminate Suspension Agreement, Rescind the Sunset and Administrative Reviews, and Resume the Antidumping Duty Investigation**

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) intends to terminate the 2013 Suspension Agreement on Fresh Tomatoes from Mexico (2013 Agreement), rescind the five-year sunset review of the suspended investigation and the administrative review of the 2013 Agreement, and to resume the antidumping duty (AD) investigation initiated in 1996.

**DATES:** Applicable [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Sally C. Gannon or Rebecca Lee, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482-0162 or (202) 482-6188, respectively.

#### **SUPPLEMENTAL INFORMATION:**

##### **Background**

On April 18, 1996, Commerce initiated an AD investigation to determine whether imports of fresh tomatoes from Mexico are being, or are likely to be, sold in the United States at

less than fair value (LTFV).<sup>1</sup> On May 16, 1996, the United States International Trade Commission (ITC) notified Commerce of its affirmative preliminary injury determination.

On October 10, 1996, Commerce and certain tomato growers/exporters from Mexico initialed a proposed agreement to suspend the AD investigation. On October 28, 1996, Commerce issued its *1996 Preliminary Determination* and found imports of fresh tomatoes from Mexico were being sold at LTFV in the United States.<sup>2</sup> On the same day, Commerce and producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico signed an agreement to suspend the investigation (1996 Agreement).<sup>3</sup>

On May 31, 2002, certain tomato growers/exporters from Mexico accounting for a significant percentage of all fresh tomatoes imported into the United States from Mexico provided written notice to Commerce of their withdrawal from the 1996 Agreement, effective July 30, 2002. Because the 1996 Agreement would no longer cover substantially all imports of fresh tomatoes from Mexico, effective July 30, 2002, Commerce terminated the 1996 Agreement, terminated the sunset review of the suspended investigation, and resumed the AD investigation.<sup>4</sup>

On November 8, 2002, Commerce and certain tomato growers/exporters from Mexico initialed a proposed agreement suspending the resumed AD investigation on imports of fresh tomatoes from Mexico. On December 4, 2002, Commerce and producers/exporters accounting

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<sup>1</sup> See *Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico*, 61 FR 18377 (April 25, 1996).

<sup>2</sup> See *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes from Mexico*, 61 FR 56608 (November 1, 1996) (*1996 Preliminary Determination*).

<sup>3</sup> See *Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico*, 61 FR 56618 (November 1, 1996).

<sup>4</sup> See *Notice of Termination of Suspension Agreement, Termination of Sunset Review, and Resumption of Antidumping Investigation: Fresh Tomatoes from Mexico*, 67 FR 50858 (August 6, 2002).

for substantially all imports of fresh tomatoes from Mexico signed a new suspension agreement (2002 Agreement).<sup>5</sup>

On November 26, 2007, certain tomato growers/exporters from Mexico accounting for a significant percentage of all fresh tomatoes imported into the United States provided written notice to Commerce of their withdrawal from the 2002 Agreement, effective 90 days from the date of their withdrawal letter (*i.e.*, February 24, 2008), or earlier, at Commerce's discretion.

On November 28, 2007, Commerce and certain tomato growers/exporters from Mexico initialed a new proposed agreement to suspend the AD investigation on imports of fresh tomatoes from Mexico. On December 3, 2007, Commerce released the initialed agreement to interested parties for comment. On December 17 and 18, 2007, several interested parties filed comments in support of the initialed agreement.

Because the 2002 Agreement would no longer cover substantially all imports of fresh tomatoes from Mexico, Commerce published a notice of intent to terminate the 2002 Agreement, intent to terminate the five-year sunset review of the suspended investigation, and intent to resume the AD investigation.<sup>6</sup> On January 16, 2008, Commerce published a notice of termination of the 2002 Agreement, termination of the five-year sunset review of the suspended investigation, and resumption of the AD investigation, effective January 18, 2008.<sup>7</sup> On January 22, 2008, Commerce signed a new suspension agreement (2008 Agreement) with producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico.<sup>8</sup>

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<sup>5</sup> See *Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico*, 67 FR 77044 (December 16, 2002).

<sup>6</sup> See *Fresh Tomatoes from Mexico: Notice of Intent to Terminate Suspension Agreement, Intent to Terminate the Five-Year Sunset Review, and Intent to Resume Antidumping Investigation*, 72 FR 70820 (December 13, 2007).

<sup>7</sup> See *Fresh Tomatoes from Mexico: Notice of Termination of Suspension Agreement, Termination of Five-Year Sunset Review, and Resumption of Antidumping Investigation*, 73 FR 2887 (January 16, 2008).

<sup>8</sup> See *Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico*, 73 FR 4831 (January 28, 2008).

On August 15, 2012, certain growers/exporters of fresh tomatoes from Mexico filed a letter with Commerce requesting consultations under Section IV.G.<sup>9</sup> of the 2008 Agreement, and Commerce agreed to consult. As a result of these consultations, on February 2, 2013, Commerce and tomato growers/exporters from Mexico accounting for a significant percentage of all fresh tomatoes imported into the United States from Mexico initialed a draft agreement that would suspend a resumed AD investigation on fresh tomatoes from Mexico. On February 08, 2013, Commerce published a notice of intent to terminate the 2008 Agreement, intent to terminate the five-year sunset review of the suspended investigation, and intent to resume the AD investigation.<sup>10</sup> On March 1, 2013, Commerce issued a notice of termination of the 2008 Agreement, termination of the five-year sunset review of the suspended investigation, and resumption of the AD investigation.<sup>11</sup> On March 4, 2013, Commerce and producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico signed a new suspension agreement (2013 Agreement).<sup>12</sup>

On January 9, 2018, Commerce issued a letter that formally opened consultations with the Mexican tomato growers/exporters to negotiate possible revisions to the 2013 Agreement.<sup>13</sup> Since that time, Commerce has continued to negotiate with the Mexican growers/exporters and, in parallel, has continually consulted with representatives of the domestic industry.

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<sup>9</sup> Section IV.G. of the 2008 Agreement states that Commerce will consult with signatory producers/exporters regarding the operations of the 2008 Agreement. A party may request such consultations in any April or September (*i.e.* prior to the beginning of each season) following the first year of the signing of the 2008 Agreement.

<sup>10</sup> See *Fresh Tomatoes from Mexico: Intent To Terminate Suspension Agreement and Resume Antidumping Investigation and Intent To Terminate Sunset Review*, 78 FR 9366 (February 8, 2013).

<sup>11</sup> See *Fresh Tomatoes from Mexico: Termination of Suspension Agreement, Termination of Five-Year Sunset Review, and Resumption of Antidumping Investigation*, 78 FR 14771 (March 7, 2013).

<sup>12</sup> See *Fresh Tomatoes from Mexico: Suspension of Antidumping Investigation*, 78 FR 14967 (March 8, 2013).

<sup>13</sup> See Letter from Commerce to CAADES *et al.*, “Consultations on the 2013 Agreement Suspending the Antidumping Investigation on Fresh Tomatoes from Mexico,” dated January 9, 2018.

On February 1, 2018, Commerce initiated a five-year sunset review of the suspended investigation.<sup>14</sup> On March 29, 2018, the Florida Tomato Exchange (FTE), a member of the U.S. petitioning industry, filed a request that Commerce conduct an administrative review on growers/exporters of fresh tomatoes from Mexico covered by the 2013 Agreement. On May 2, 2018, Commerce initiated the administrative review of the 2013 Agreement.<sup>15</sup> On August 27, 2018, Commerce published in the *Federal Register* the preliminary results of the five-year sunset review of the suspended investigation.<sup>16</sup> Commerce preliminarily found dumping was likely to continue or recur at weighted-average margins up to 188.14 percent.

On November 14, 2018, the FTE filed a request that Commerce terminate the 2013 Agreement and resume the AD investigation under Section VI.B of the 2013 Agreement.<sup>17</sup> Section VI.B of the 2013 Agreement states that “the signatories or the Department may withdraw from this Agreement upon ninety days written notice to the other party.” On November 27, 2018, the Fresh Produce Association of the Americas, filed a rebuttal to FTE’s request to terminate.<sup>18</sup> On November 26, 2018 and November 28, 2018, respectively, Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Asociación de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate (CAADES *et al.* or the Mexican growers) submitted responses to FTE’s previous request for Commerce to terminate the 2013

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<sup>14</sup> See *Initiation of Five-Year (Sunset) Reviews*, 83 FR 4641 (February 1, 2018).

<sup>15</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 19215 (May 2, 2018).

<sup>16</sup> See *Fresh Tomatoes from Mexico: Preliminary Results of the Five-Year Sunset Review of the 2013 Suspension Agreement on Fresh Tomatoes from Mexico* 83 FR 43642 (August 27, 2018).

<sup>17</sup> See Letter to Wilbur Ross, Secretary of Commerce, from the FTE, “Fresh Tomatoes from Mexico: Request to Terminate Antidumping Suspension Agreement,” dated November 14, 2018.

<sup>18</sup> See Letter to Wilbur Ross, Secretary of Commerce, from the Fresh Produce Association of the Americas, “Re: Fresh Tomatoes from Mexico: FTE’s Misleading Request to Terminate Agreement,” dated November 27, 2018.

Agreement.<sup>19,20</sup> On December 18, 2018, NS Brands, Ltd (NatureSweet), a signatory to the 2013 Agreement, filed a letter in support of the November 28, 2018 response by the Mexican growers.<sup>21</sup>

### **Scope of the Agreement**

The merchandise subject to the 2013 Agreement is all fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin, except for those tomatoes which are for processing. For purposes of this suspended investigation, processing is defined to include preserving by any commercial process, such as canning, dehydrating, drying, or the addition of chemical substances, or converting the tomato product into juices, sauces, or purees. Fresh tomatoes that are imported for cutting up, not further processing (*e.g.*, tomatoes used in the preparation of fresh salsa or salad bars), are covered by the 2013 Agreement.

Commercially grown tomatoes, both for the fresh market and for processing, are classified as *Lycopersicon esculentum*. Important commercial varieties of fresh tomatoes include common round, cherry, grape, plum, greenhouse, and pear tomatoes, all of which are covered by the 2013 Agreement.

Tomatoes imported from Mexico covered by the 2013 Agreement are classified under the following subheading of the Harmonized Tariff Schedule of the United States (HTSUS), according to the season of importation: 0702. Although the HTSUS numbers are provided for convenience and customs purposes, the written description of the scope of the 2013 Agreement is dispositive.

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<sup>19</sup> See Letter to Wilbur Ross, Secretary of Commerce, from CAADES *et al.*, “2013 Suspension Agreement on Fresh Tomatoes from Mexico,” dated November 26, 2018.

<sup>20</sup> See Letter to Wilbur Ross, Secretary of Commerce, from CAADES *et al.*, “2013 Suspension Agreement on Fresh Tomatoes from Mexico,” dated November 28, 2018.

<sup>21</sup> See Letter to Wilbur Ross, Secretary of Commerce, from NS Brands, Ltd., “2013 Suspension Agreement on Fresh Tomatoes from Mexico: NS Brands’ Response to Petitions Request to Terminate 2013 Suspension Agreement,” dated December 18, 2018.

## **Intent to Terminate Suspension Agreement and Resume the Antidumping Investigation**

On February 6, 2019, Commerce gave notice of intent to withdraw from the 2013 Agreement to the Mexican signatories.<sup>22,23</sup> In accordance with Section VI.B of the 2013 Agreement, Commerce's withdrawal from the 2013 Agreement shall be effective on May 7, 2019 which is 90 days after such notice.<sup>24</sup> If parties do not reach a new suspension agreement on or before May 7, 2019, Commerce intends to terminate the 2013 Agreement and resume the underlying AD investigation, in accordance with section 734(i)(1)(B) of the Tariff Act of 1930, as amended (the Act). Pursuant to section 734(i)(1)(B) of the Act, Commerce will resume the investigation as if it had published the affirmative preliminary determination under section 733(b) of the Act on the effective date of the termination, May 7, 2019. As explained in its *1996 Preliminary Determination*, Commerce postponed the final determination until the 135<sup>th</sup> day after the date of the preliminary determination.<sup>25</sup> Commerce, therefore, will issue its final determination in a resumed investigation 135 days after the affirmative preliminary determination (*i.e.* the effective date of termination of the 2013 Agreement on May 7, 2019), unless a new suspension agreement becomes effective. However, if Commerce and producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico sign a new suspension agreement, following the notice and comment period provided in accordance with section 734(c) of the Act, the resumed investigation will be suspended.

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<sup>22</sup> See Letter to Interested Parties from P. Lee Smith, Deputy Assistant Secretary for Policy & Negotiations, re "Withdrawal from the 2013 Suspension Agreement on Fresh Tomatoes from Mexico," dated February 6, 2019.

<sup>23</sup> See Ex Parte Memorandums for Telephone Calls to Interested Parties, filed February 13, 2019.

<sup>24</sup> Ninety days from December 31, 2018 falls on March 31, 2019. Because this date falls on a non-business day (*i.e.*, the weekend), consistent with Commerce's practice, the period will run until the next business day. See *Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005).

<sup>25</sup> See *1996 Preliminary Determination* at 56609.

On February 14, 2019, and February 19, 2019, the Mexican growers and NatureSweet, respectively, filed comments in response to Commerce's intent to withdraw.<sup>26,27</sup>

### **Intent to Rescind the Five-Year Sunset Review**

On February 1, 2018, Commerce initiated a five-year sunset review of the suspended AD investigation on fresh tomatoes from Mexico pursuant to section 751(c) of the Act. If Commerce terminates the 2013 Agreement, there will no longer be a suspended investigation of which to conduct a sunset review. Therefore, Commerce will rescind the sunset review of the suspended AD investigation on fresh tomatoes from Mexico, effective on the date of termination of the 2013 Agreement, if the 2013 Agreement is terminated.

### **Intent to Rescind the Administrative Review**

On May 2, 2018, Commerce initiated an administrative review of the 2013 Agreement for the period March 1, 2017 through February 28, 2018. If Commerce terminates the 2013 Agreement, the ongoing administrative review would be moot. Therefore, Commerce will rescind the administrative review of the 2013 Agreement, effective on the date of termination of the 2013 Agreement.

### **International Trade Commission**

Commerce has notified the ITC of its intent to terminate the 2013 Agreement and resume the suspended AD investigation.<sup>28</sup> If Commerce resumes the suspended AD investigation, and if Commerce makes a final affirmative determination in the investigation, the ITC is scheduled to

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<sup>26</sup> See Letter to Wilbur Ross, Secretary of Commerce, from CAADES *et al.*, "2013 Suspension Agreement on Fresh Tomatoes from Mexico," dated February 14, 2019.

<sup>27</sup> See Letter to Wilbur Ross, Secretary of Commerce, from NatureSweet, "2013 Suspension Agreement on Fresh Tomatoes from Mexico: NS Brands' Response to the Commerce Department's letter of Withdrawal from 2013 Suspension Agreement," dated February 19, 2019.

<sup>28</sup> See Letter to Michael Anderson, Director of Office of Investigations, from P. Lee Smith, Deputy Assistant Secretary for Policy & Negotiations, re "Fresh Tomatoes from Mexico: Withdrawal from the 2013 Suspension Agreement," dated February 6, 2019.



make its final determination concerning injury within 45 days of publication of Commerce's final determination. If both Commerce's and the ITC's final determinations are affirmative, Commerce will issue an AD order. However, as indicated above, if Commerce and producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico sign a new suspension agreement, following the notice and comment period provided in accordance with section 734(c) of the Act, the resumed investigation will be suspended.

### **Suspension of Liquidation**

If Commerce terminates the 2013 Agreement and resumes the suspended AD investigation as described above, Commerce will instruct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of fresh tomatoes from Mexico that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the termination of the 2013 Agreement. CBP shall require AD cash deposits or bonds for entries of the subject merchandise based on the preliminary dumping margins, which range from 4.16 to 188.45 percent.<sup>29</sup>

### **Administrative Protective Order Access and Applicable Regulations**

The following requirements will apply if and during such time as the suspended investigation is resumed. Because of the significant changes made to the administrative protective order (APO) process since initiation of the investigation in 1996, Commerce will issue a new APO for any resumed investigation that will supersede the previously issued firm-specific APOs. Those authorized applicants that were granted APOs during the original investigation, as indicated in the most recent APO service list on Commerce's website, will continue to have access to business proprietary information under APO. Any new APO applications or necessary

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<sup>29</sup> See 1996 Preliminary Determination.

amendments for changes in staff under the pre-existing APOs should be submitted promptly, and in accordance with Commerce's regulations currently in effect.<sup>30</sup>

In addition, because of the significant changes made to Commerce's filing and certification requirements since the investigation, including electronic filing, Commerce intends to apply its current regulations and practices with regard to filing and certification, should the AD investigation be resumed.<sup>31</sup> However, with respect to all other procedures for the conduct of any resumed investigation generally, including any possible suspension thereof, Commerce's regulations in effect in 1996 shall govern.<sup>32</sup>

This determination is issued and published in accordance with section 733(f) and 734(i) of the Act.

**Dated:** February 27, 2019.

**Gary Taverman,**  
*Deputy Assistant Secretary*  
*for Antidumping and Countervailing Duty Operations,*  
*performing the non-exclusive functions and duties of the*  
*Assistant Secretary for Enforcement and Compliance.*

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<sup>30</sup> See section 777(c)(1) of the Act and 19 CFR 351.103, 351.304, 351.305 and 351.306.

<sup>31</sup> See 19 CFR 351.303(b) and (g).

<sup>32</sup> See 19 CFR 351.701; *San Vicente Camalu SPR de Ri v. United States*, 491 F.Supp.2d 1186 (CIT 2007).

